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Held at Headquarters, New York, on Monday, 2 July 2012, at 10 a.m.

Chair: Mr. Sikirić. . . . . (Croatia)

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The meeting was called to order at 10.30 a.m.

Finalization and adoption of the Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules, as revised in 2010
(A/CN.9/746 and Add.1 and A/CN.9/747 and Add.1)

1. **Ms. Gross** (Secretariat), introducing the draft revised Recommendations (A/CN.9/746 and Add.1), said that the Commission had instructed the secretariat to revise the existing Recommendations after adopting revised UNCITRAL Arbitration Rules in 2010. In accordance with its mandate, the secretariat had followed the pattern of the 1982 Recommendations, which meant that the documents mirrored their format. A new section, contained in A/CN.9/746/Add.1, covered arbitral institutions acting as appointing authorities. In the course of its work, the secretariat had consulted with arbitral institutions around the world. Where appropriate, the revised Recommendations provided examples of actual practice, footnoted with links to the websites of the respective organizations. In that connection, she noted that, in footnote 4, the Qatar Chamber of Commerce and Industry should be added to the list of the arbitral institutions involved in the consultation process and that the following footnote should be inserted in paragraph 17, after the phrase "the provisions of article 40 (f) would not apply": "An arbitral institution, may, however, retain article 40 (f) for the case where the arbitral institution would not act as appointing authority. For example, the Qatar Chamber of Commerce and Industry (QICCA) states in article 43 (2) (h) of its Arbitration Rules, which are based on the UNCITRAL Arbitration Rules (as revised in 2010): 'Any fees and expenses of the appointing authority in case the Center is not designated as the appointing authority'."

2. **Ms. Nesdam** (Norway) said that the secretariat had asked her to submit Norway's comments orally, since its e-mailed submission had apparently been blocked. In her country's view, paragraphs 7 and 8 of the revised Recommendations should clearly state that institutions could draft their arbitration rules in the form best suited to their legal traditions as long as they remained faithful to the substance of the Arbitration Rules. Furthermore, because institutional arbitration rules were subject to national law, a discussion on tailoring the UNCITRAL Rules to the law of the applicable jurisdiction should be incorporated in paragraphs 9 to 17.

3. **Mr. Sorieul** (Secretary of the Commission) said that, like all UNICTRAL texts, the Arbitration Rules were soft law. Thus, it was already tempting for adopting institutions to rewrite them to suit a particular set of users, which would defeat their normative purpose. Considerable time and effort had been devoted to ensuring that the Rules were acceptable to all as written. The Commission had a duty to remind users to adhere as closely as possible to the text and should not encourage them to take greater liberties.

4. **Ms. Gross** (Secretariat) said that the secretariat's mandate called for it to follow the same pattern as the 1982 Recommendations, which, in paragraphs 10 and 11, appealed to adopting institutions to leave the UNCITRAL Arbitration Rules unchanged. Straying too far from the 1982 Recommendations might suggest that the revised Arbitration Rules contained more revisions than they actually did.

5. **Mr. Bellenger** (France) expressed surprise that the revised Recommendations had not been submitted to the Working Group. Meeting as the Commission, the delegations did not have the expertise required to discuss them. His delegation was therefore not in a position to comment on the Norwegian proposal.

6. **Ms. Gross** (Secretariat) said that the secretariat had acted in accordance with paragraph 189 of the Commission's report on its forty-third session (A/65/17), which asked the secretariat to draft revised Recommendations and present them to the Commission, not the Working Group.

7. **Mr. Schoefisch** (Germany) said that, as a non-expert, he could not judge the merits of the Norwegian proposal. Perhaps the Commission should agree on a procedure for giving due consideration to comments that had not been submitted earlier because of technical problems.

8. **Ms. Matias** (Israel) said that her delegation did not support the changes proposed by Norway. Since the purpose of the Arbitration Rules was to ensure that the courts were uniformly able to deal with the issues addressed in them, it was important to have countries adopt essentially identical texts.

9. **Ms. Sabo** (Canada) said that the purpose of the Recommendations was to facilitate the use of the Arbitration Rules as they had been adopted by the

Commission, and her delegation could not support changes to the text that would in essence approve modifying the Rules.

10. **The Chair** said that he took it that the Commission had rejected the Norwegian proposal.

11. *It was so decided.*

12. **Ms. Escobar Pacas** (El Salvador) said that, as her country's comments had also not been received, she would submit them orally. First, paragraph 11 of the revised Recommendations stated that article 1, paragraph 2, of the Arbitration Rules defined the date of effect of the Rules, when it actually defined the date after which parties to an arbitration agreement would be presumed to have referred to the UNCITRAL Arbitration Rules in effect. To avoid confusion, she suggested the following wording: "Article 1, paragraph (2), of the 2010 UNCITRAL Arbitration Rules defines the date after which the parties to an arbitration agreement are presumed to have referred to the Rules in effect on the date of commencement of the arbitration. Obviously, the institutional rules based on the UNCITRAL Arbitration Rules will have their own specific date after which the parties will refer to the current version of the institutional rules. In the interest of legal certainty, the institutional arbitration rules should indicate the date after which the parties will be presumed to have referred to the rules in effect, so that it is absolutely clear which version is applicable."

13. Second, to avoid the impression that the model arbitration clause in the Arbitration Rules had been revised, the Spanish text of the draft model clause in paragraph 26 of the Recommendations should be brought into line with the Spanish-language wording of the model arbitration clause on which it was based.

14. **Mr. Madrid Parra** (Spain) said that Spain had submitted the same comment regarding paragraph 26 (A/CN.9/747). He concurred with the representative of Germany that a procedure should be adopted to allow proper consideration of comments presented orally because of technical difficulties.

15. **Ms. Sabo** (Canada) said that the issues raised by El Salvador and Spain appeared to involve drafting changes and could be resolved by the secretariat.

16. **The Chair** said that, in the absence of objections, he would take it that the Commission wished to entrust the required changes to the secretariat.

17. *It was so decided.*

18. **Mr. Loken** (United States of America), referring to document A/CN.9/746/Add.1, paragraph 40, said that it was necessary to clarify the meaning of the sentence "That mechanism is not supposed to create delays, as the appointing authority is requested to intervene in the appointment process". For it to make sense, the words "is requested to intervene" should be replaced by "will, in any event, have to intervene". In paragraph 44, which contained recommendations on appointing a presiding arbitrator, the phrase "factors to take into consideration" was too prescriptive and should be replaced with "factors that might be taken into consideration". Paragraph 44 also indicated that the arbitrator's nationality should be different from that of the parties, while the Rules said only that the appointing authority should "take into account the advisability" of appointing an arbitrator of a different nationality. The best solution was probably to delete the phrase "as well as his or her nationality, which is recommended to be different from that of the parties".

19. **Ms. Sabo** (Canada) said that her delegation did not think that the recommendation in paragraph 44 differed significantly from what was stated in the Arbitration Rules, but that if the reference to nationality was deleted in paragraph 44, it would also need to be deleted in paragraph 38.

20. **The Chair** suggested that the secretariat should be requested to adjust paragraph 38.

21. *It was so decided.*

22. **Mr. Loken** (United States of America) said that the last sentence in A/CN.9/746/Add.1, paragraph 53, relating to the exceptional circumstances under which a party might be deprived of its right to appoint a substitute arbitrator, gave the following examples of such circumstances: "if a party used dilatory tactics with respect to the replacement procedure of an arbitrator [or] if the improper conduct of the arbitrator is clearly attributable to the party". He did not recall any mention during the Working Group's deliberations of the example of a party using dilatory tactics with respect to the replacement of an arbitrator and suggested eliminating it.

23. **The Chair** proposed that the last sentence in paragraph 53 should be revised to read: "Such exceptional circumstances could include cases of improper conduct of a party or of an arbitrator, for

example, improper conduct of an arbitrator that is clearly attributable to the party."

24. **Ms. Sabo** (Canada) said that her delegation did not object to the example of a party using dilatory tactics, although other illustrations were possible. However, the example involving the improper conduct of an arbitrator shifted the focus of the paragraph, which was on the improper conduct of the party. The "arbitrator" example should be replaced or, if not, rephrased to stress that the fault lay with the party.

25. **Mr. Loken** (United States of America) objected to the example of dilatory conduct on the grounds that depriving a party of such a basic right as its right to appoint an arbitrator should be reserved for truly egregious behaviour.

26. **Mr. Maradiaga** (Honduras) said that the purpose of the Arbitration Rules was to facilitate the rapid settlement of disputes. If a party deliberately attempted to delay the settlement of a case, such behaviour constituted sufficient grounds for the appointing authority to deprive it of its right to appoint an arbitrator.

27. **Mr. Loken** (United States of America) noted that paragraph 53 already stated that the decision to deprive a party of its right to appoint an arbitrator "should be based on the faulty behaviour of the party" and "should not be subject to defined criteria". The best solution would be simply to delete the last sentence.

28. *It was so decided.*

29. **Mr. Loken** (United States of America), referring to paragraph 54 on how an appointing authority should go about deciding whether to permit a truncated tribunal to proceed with arbitration under article 14, paragraph 2 (b), questioned the statement in the first sentence that the "appointing authority must take into consideration the stage of the proceedings". In his understanding, it was permissible to proceed with a truncated tribunal only if the proceedings had been closed, and it would therefore be more precise to replace "take into consideration the stage of the proceedings" with "first confirm that all hearings have already been closed". Also, in the last sentence of the same paragraph, "relevant applicable law" should be replaced by "relevant law" in order to avoid introducing issues of applicable law.

30. **Ms. Gross** (Secretariat), referring to the proposed change in the first sentence of paragraph 54, agreed that a truncated tribunal could not proceed unless the hearings had already closed. However, the intent of the paragraph would be better served by leaving the first sentence unchanged and, at the beginning of the second sentence, replacing the phrase "If the hearings are closed" with "Bearing in mind that the hearings are closed".

31. *It was so decided.*

32. **Mr. Loken** (United States of America) wished to propose two more changes in document A/CN.9/746/Add.1. In the penultimate sentence of paragraph 58, the phrase "If the appointing authority fails to act" should be replaced by "If the appointing authority has not yet been designated or fails to act", and in the first sentence of paragraph 60, the words "in its review" should be clarified to read "if adjustment of fees and expenses is necessary".

33. **The Chair** said that he would make sure that all of the different views expressed, especially with respect to the Norwegian proposal, were reflected in the Commission's report. As he heard no further objections to the United States proposals, he took it that the Commission wished to adopt them as orally revised.

34. *It was so decided.*

35. *Documents A/CN.9/746 and Add.1, as orally revised, were adopted.*

The meeting was suspended at 12.30 p.m. and resumed at 12.40 p.m.

Draft decision on adoption of the Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules, as revised in 2010 (A/CN.9/XXXXV/CRP.3)

36. **Ms. Mwaura** (Kenya) proposed that the words "interested circles" should be replaced by "interested bodies" and that the reference to the annex to the report should be replaced by a reference to the specific annex, which, according to the Chair, would be annex I.

37. *It was so decided.*

38. *Draft decision A/CN.9/XLV/CRP.3, as orally amended, was adopted.*

Arbitration and conciliation: progress report of Working Group II (A/CN.9/736 and A/CN.9/741)

39. **The Chair**, drawing the Commission's attention to the reports of Working Group II (Arbitration and Conciliation) on the work of its fifty-fifth and fifty-sixth sessions (A/CN.9/736 and A/CN.9/741), which had been devoted to the preparation of a legal standard on transparency in treaty-based investor-State arbitration, said that the Commission was called upon to take note of that work.

40. **Mr. Schoefisch** (Germany) said that, in taking note of the Working Group's progress, his country wished to request that it finish its work by the Commission's forty-sixth session.

41. **Ms. Sabo** (Canada) said that Canada was satisfied with the Working Group's progress thus far on what her Government considered a very important project. She urged the member States to seek creative solutions that would allow States to apply the rules on transparency in treaty-based investor-State arbitration not only to future treaties but also to existing ones.

42. **Mr. Bellenger** (France) was somewhat concerned about the Working Group's slow progress and preoccupation with technical details, such as the scope of application of article 1 of the draft rules, to which it seemed to have devoted most of its fifty-sixth session. The Commission should express concern, remind the Working Group of its mandate and encourage it to adopt more efficient working methods. Having apparently reached a consensus on matters of substance, it should move quickly to finalize the draft standard.

The meeting rose at 1 p.m.